

S.B.CIVIL ARBITRATION APPLICATION NO.1/2006

M/s M.Patel and Co. vs. Chief Engineer,Irrigation Deptt. & Ors.

DATE OF ORDER : 6/10/2006

HON'BLE SHRI RAJESH BALIA, J.

Mr.Rajesh Joshi, for the applicant.

Learned counsel for the applicant states that since filing of the application under Section 11 of the Arbitration and Conciliation Act, 1996, the respondents have thereafter referred the matter to the arbitrator named in the agreement as per terms of the agreement.

It is contended by the learned counsel for the applicant that once the respondents have failed to respond to the notice given for making a reference for appointment of arbitrator in terms of the agreement within the time allowed on receipt of the notice, they lost their right to appoint the Arbitral Tribunal and matter rests exclusively in the domain of Chief Justice or his designate under Section 11 before whom the application comes up for orders and, therefore, reference to the Arbitral Tribunal made by the respondents be ignored and sole arbitrator may be appointed.

It is true that once the other party to the agreement fails to

respond to the notice for appointing Arbitral Tribunal in terms of the agreement, it loses its right to appoint or nominate Arbitral Tribunal and the matter rests exclusively in the domain of Chief Justice or his designate while considering the application under Section 11 of the Act of 1996. However, this cannot be construed to mean that in all circumstances, the Arbitral Tribunal must necessarily be different than what has been nominated in the agreement itself. The present is not the case in which Arbitral Tribunal is to be appointed by one or the other party to the agreement, but it is a case where Arbitral Tribunal has already been nominated in the agreement itself, therefore, in such matters unless there is a grave doubt about impartiality of the Arbitral Tribunal already nominated in the agreement, it does not go beyond the jurisdiction of the Chief Justice or his designate if he directs the parties to refer their dispute to the Arbitral Tribunal named by them in the agreement because in such cases the question really is not the appointment of Arbitral Tribunal by naming a person of one's choice but is a case of making a reference of the dispute to the Arbitral Tribunal.

Sub-section (6) of Section 11 only provides where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, a request may be made to the Chief Justice or any person or institution designated by him to take a necessary measure, unless the agreement on the appointment procedure

provides other means for securing the appointment.

As noticed by me above, it is a case in which appointment of Arbitral Tribunal has already been made vide agreement itself. Under the procedure required, whenever dispute is raised, it should be referred to such Arbitral Tribunal or Standing Committee, therefore, under clause (a) of sub-section (6) of Section 11, it can be said that respondents have failed to act as required under the procedure by making reference of the dispute to the Arbitral Tribunal. There is nothing which prevents the Chief Justice or his designate in such cases to direct the other party to refer the dispute to complete the procedure and to activate the Arbitral Tribunal because unless the dispute is referred to the Arbitral Tribunal named by the parties, it does not become alive.

In the facts and circumstances of the case, since the reference has been made to the Arbitral Tribunal named in the agreement itself and there is no serious objection to the procedure adopted under the agreement, no further directions are required to be passed except that for this delay respondents be saddled with cost, which is quantified as Rs.20,000/-. The application is disposed of accordingly.

(RAJESH BALIA), J.